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SURFACE TRANSPORTATION BOARD[1]

DECISION

Finance Docket No. 30400 (Sub-No. 21)

SANTA FE SOUTHERN PACIFIC CORPORATION – CONTROL – SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: November 26, 1996

INTRODUCTION

This proceeding concerns requests by rail employees for labor protective benefits allegedly due because of employer actions taken in anticipation of a rail merger that was not approved by the ICC. The employees (as a class) were given an opportunity to demonstrate that they were harmed by actions taken by the holding company, allegedly in violation of the Interstate Commerce Act (ICA), while the carrier was held in a voting trust pending ICC approval of the consolidation. We conclude that the employees have failed to provide probative evidence that they were harmed by actions of the holding company.

BACKGROUND

In Santa Fe Southern Pacific Corp.–Control–SPT Co., 2 I.C.C.2d 709 (1986) (SFSP I) and 3 I.C.C.2d 926 (1987) (SFSP II),

[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 11323. Therefore, this decision applies the law in effect prior to the ICCTA and citations are to the former sections of the statute, unless otherwise indicated.

the ICC denied the proposed merger of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and Southern Pacific Transportation Company (SPT). Before the merger application was filed, the railroads' holding companies were merged to form the Santa Fe Southern Pacific Corporation (SFSP). To avoid unlawful common control of the two railroads pending ICC consideration of the merger proposal, SFSP had arranged for a trustee to acquire the stock of SPT under an ICC-approved independent voting trust.

After the rail merger was denied, SFSP was forced to divest its interest in either Santa Fe or SPT. SFSP sold its interest in SPT to Rio Grande Industries (RGI) under authority granted in Rio Grande Industries, Et Al.–Control–SPT Co. Et Al., 4 I.C.C.2d 834 (1988) (Rio Grande), aff'd sub nom. Kansas City Southern Industries, Inc. v. I.C.C., 902 F.2d 423 (5th Cir. 1990). The voting trust was dissolved on October 13, 1988, when the Rio Grande-SPT acquisition was consummated.

During the Rio Grande proceeding, rail labor interests asserted that certain employees of Santa Fe and SPT had been adversely affected by employer actions taken in anticipation of the proposed Santa Fe-SPT merger and that labor protective conditions should be imposed. The ICC determined that it did not have authority under 49 U.S.C. 11347 to impose conditions for those employees in Rio Grande.[2] However, the ICC held that it did have continuing jurisdiction over the SPT voting trust to impose additional conditions and thus could impose conditions for those SPT or Santa Fe employees who could demonstrate that they

[2] Section 11347 required the ICC to impose protective conditions for the benefit of carrier employees affected by a transaction under 49 U.S.C. 11344-45 or 11346. These transactions included consolidations, mergers and acquisitions of control.

were adversely affected as a consequence of actions taken or orders issued by SFSP.

The ICC thus instituted this sub-numbered proceeding to consider the matter. After comments were filed, the ICC, by decision served February 9, 1989, concluded that: (1) unilateral displacement of employees by Santa Fe or SPT management would be governed by applicable collective bargaining agreements; (2) because SFSP was lawfully in control of Santa Fe, any grievances by Santa Fe employees could properly be resolved through collective bargaining agreements; (3) no basis had been shown to justify imposing conditions for the benefit of SPT employees under section 11347; and (4) if actions in anticipation of the merger adverse to SPT employees were shown to have been ordered by SFSP, in violation of section 11343, the adversely affected individuals would have a court remedy under 49 U.S.C. 11705.

On judicial review,[3] the court affirmed portions of the ICC's decision, but disagreed that aggrieved SPT employees had available to them a cause of action in the courts under section 11705, citing its earlier decision in Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d 1193 (9th Cir. 1989) (Kraus).[4] Instead, the court concluded that while 49 U.S.C. 11347 did not require the ICC to impose labor protection for employees, section 11344(c) gave the ICC discretionary power to do so.

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[3] Railway Labor Executives' Assn v. I.C.C., 924 F.2d 961 (9th Cir. 1991).

[4] The court in Kraus held that section 11705 authorized court enforcement of the merger provisions of the ICA only after the ICC had considered whether the alleged violations occurred.

On rehearing,[5] the court found that the labor protective conditions mandated by section 11347 for approved transactions were not appropriate because SFSP was involved in a divestiture, not a section 11343 merger or consolidation. However, the court concluded that the ICC had general discretionary authority to impose appropriate conditions and remanded the case for consideration of this issue. As a result, this proceeding was reopened to give SPT employees (as a class) an opportunity to demonstrate that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed Santa Fe-SPT merger.

The Brotherhood of Maintenance of Way Employees (BMWE) and International Association of Machinists and Aerospace Workers (IAMAW) (collectively, the unions) filed a brief and evidence. SPT and the Santa Fe Pacific Corporation (SFP) replied.[6] The unions filed a brief in rebuttal. In addition, Sieu Mei Tu (Tu), a former employee of the Pacific Fruit Express (PFE), an SPT subsidiary, participated in this proceeding as an aggrieved employee.[7] Her husband joined in her request for conditions.

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[5] Railway Labor Executives' Ass'n v. I.C.C., 958 F.2d 252 (9th Cir. 1992) (superseding previous opinion).

[6] After the rail merger was denied and Rio Grande acquired SPT, SFSP changed its name to Santa Fe Pacific Corporation.

[7] A large portion of Tu's filings, responded to by SPT and SFP, concern her allegation that PFE employees were SPT employees. We need not decide this issue unless we determine that discretionary employee protective conditions should be imposed on the transaction.

Tu also seeks to demonstrate that the loss of her individual position was a consequence of actions taken or orders issued by SFSP in contemplation of the proposed Santa Fe-SPT merger. Although we sought information on whether employees as a class were adversely affected by SFSP orders, Tu's submissions that address specific evidence with respect to those actions or orders issued by SFSP which may have affected SPT operations and work-related assignments are considered in the context of the unions' submissions on these issues.

THE STANDARD OF REVIEW

Union Arguments. The unions take issue with the standard of review as articulated in the prior decision. They contend that requiring specific evidence of adverse effect resulting from SFSP orders in contemplation of the merger is a standard which cannot be met and which amounts to "an unlawful prejudgment" that labor protective conditions will not be imposed in this case. The unions argue that it is highly unlikely that SFSP, as a sophisticated corporation, would have issued any direct order in blatant violation of the voting trust, but that in any event, they were not able to find any "written trace of such communication" through discovery.

In lieu of requiring specific evidence of actions or orders issued by SFSP that may have affected SPT operations and work-related assignments, the unions would apply a different standard. They propose that we interpret the phrase "actions taken or orders issued" to mean a mutually understood course of dealing between SPT and SFSP wherein SPT communicated its business decisions to SFSP and attempted to conform those decisions to the best interests of the proposed merged company. They submit that such behavior would violate the voting trust, which prohibited direct or indirect arrangements or dealing between SFSP and SPT.

In support of this interpretation, the unions contend that this standard was applied by the trial court and affirmed on appeal in Kraus. There, in assessing a tort claim of two former SPT managers under state law, the court concluded that, although SFSP did not issue direct orders to SPT, the course of dealing established "a willingness on [SPT's] part to find ways to comply with the cost-cutting desires of the group that seemed only a

regulatory approval away from becoming [SPT's] master." Kraus, 878 F.2d at 1199. The unions urge us similarly to find that contacts between the two which indicated a desire on SPT's part to cut costs and to make it an attractive merger partner should be deemed "actions taken or orders issued by SFSP" regarding labor matters.

Railroad Arguments. In reply, SFP argues that the unions did not contest the appropriateness of the standard of review until after they completed discovery and determined that their evidence was insufficient to meet their burden of proof. SFP urges that we reject the unions' belated attempt to establish a different standard.

According to SFP, the unions' standard of a mutually understood course of dealing is inappropriate for the circumstances of this case: because the voting trust is the mechanism by which protective conditions might be imposed, SFP's position is that the unions must show that the voting trust was violated, that is, that SFSP directed SPT's conduct. Thus, SFP argues that requiring specific evidence of actions or orders to show that SFSP exercised improper control over SPT is sensible because the purpose of the voting trust was to insulate SPT from SFSP's control.

Finally, both SFP and SPT argue that, from a policy standpoint, adopting the unions' standard would be unwise. SFP predicts that railroads would be hesitant even to undertake merger discussions for fear that any employee who suffers a change in employment status during the negotiation period would assert that the merger discussions constitute a mutually

understood course of dealing. In addition to the chilling effect for railroad mergers outside of the voting trust context, SPT asserts that the unions' standard would signal the death-knell for use of the voting trust in railroad mergers because of the potential exposure to labor protection liability.

Discussion and Conclusion. We agree with SFP and SPT that the standard articulated by the ICC in this matter is appropriate and should not be changed. Our authority to impose conditions in this case derives solely from the ICC's "continuing jurisdiction over SFSP from the time the voting trust was in effect, through the time the merger was denied, until the time the divestiture was consummated" (June 18, 1992 decision, slip op. at 2). To justify the extraordinary imposition of relief here, we would have to find that the terms of the voting trust were not honored, and that consequently SFSP unlawfully controlled SPT, even if for only limited purposes. The unions' proposed standard does not provide for the necessary cause-and-effect relationship between orders of SFSP, allegedly in control, and SPT, allegedly controlled.

The standard proffered by the unions also assumes that adverse employee actions somehow establish that SFSP was improperly influencing SPT's labor policy. That assumption ignores the very real possibility that legitimate business considerations unrelated to the proposed merger prompted the employee reductions. SPT should have taken steps to assure its viability irrespective of whether the merger was approved. Without an affirmative showing that SFSP was dictating these actions, it would not be reasonable to infer that the actions were taken for illegitimate purposes absent other factors (such

as if the actions were against SPT's own best interests) from which it might be possible to draw a conclusion of outside control.

We also agree with SFP and SPT that adoption of the suggested standard of "mutually understood course of dealing" could jeopardize the legitimate use of voting trusts and inhibit merger agreements generally, even if a voting trust is not used. Carriers contemplating consolidation might well fear that operating and personnel changes which either may take independently might later be used as the basis for imposing labor conditions on a merger which is not approved.

Notwithstanding any belated claims to the contrary, we conclude that the standard previously imposed in this proceeding is appropriate. The relevant issue is whether, during the pendency of the voting trust, SFSP exercised unlawful control of SPT in such a way as to affect its labor policy.

THE EVIDENCE

Union Argument. The unions refer to documents received in discovery[8] as proving the existence of what they characterize as a mutual course of action on the part of SPT and SFSP that adversely affected BMWE- and IAMAW-represented employees.

[8] On SFP's motion, a protective order was issued on September 3, 1992, to protect against the disclosure of confidential, proprietary or commercially sensitive business information and data obtained by any party through discovery or otherwise during the course of this proceeding. Although most of the evidence we must consider was filed under seal, pursuant to the protective order, we have no choice but to refer to that information to explain rationally our decision. We do not believe that any of the information referred to in this decision is confidential, proprietary or commercially sensitive.

Through the discovery of documents containing questions posed by SFSP's Chairman and Chief Executive Officer and answered by SPT in July 1985, and answers to interrogatories, the unions learned that, as a result of an SPT equipment maintenance schedule instituted in January 1985, 135 IAMAW employees had been furloughed during 1985. In addition, track maintenance and route upgrades had been reduced and limited, resulting in the abolition of at least 150 BMWE positions during the first half of 1985. Furthermore, in response to interrogatories, they learned that 49 BMWE positions on the Northwestern Pacific Railroad Company (NWP), an SPT subsidiary, had been eliminated between December 1984 and April 1985. According to the unions, this cost cutting continued into 1986, when SPT informed SFSP that it intended to eliminate approximately 4,000 union employees' jobs during that year.

The unions contend that any claims which SPT might make that these programs were undertaken due to financial problems and a decline in business are without merit, because SFSP and SPT are estopped from alleging that SPT was in serious financial straits, citing the ICC's decision in SFSP II, 3 I.C.C.2d at 932-33.[9] They also note that, if SPT needed money, it could have asked SFSP for any necessary funds,[10] but it never did so. In any event, the unions view the communications between SPT and SFSP management as indicating that the cost-cutting actions were made in consideration of SPT's place in a merged system.[11]

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[9] In SFSP II, the ICC stated: "Moreover, applicants have expressly abandoned the `failing firm' theory as a supporting basis for merger. They acknowledge that both ATSF and SPT can stand alone."

[10] In approving the voting trust, the ICC noted that SFSP had committed to supply any necessary funds to SPT.

[11] The unions point to communications between SFSP and SPT regarding changes in SPT's operations. These, they claim, led to

The unions allege that the reductions-in-force mentioned above evince an adverse effect suffered by those classes of employees in anticipation of the proposed merger. In their view, the class-wide effect fully justifies the exercise of the ICC's discretion to impose conditions. In sum, the unions submit that they have made a sufficient showing of adverse effect to warrant conditions for their members.

Other documents were submitted as evidence of contacts and policy directives by SFSP to SPT. These include: SFSP's 1984 Annual Report; a 1985 Audit Committee report; the verified statement of the vice-presidents for labor relations of Santa Fe and SPT submitted with the merger application, supporting the application's labor impact exhibit (as required by the ICC's consolidation regulations); a press release describing the anticipated benefits of consolidation including reduced labor requirements; a confidential memo from SPT to SFSP's officers describing SPT's anticipated course of action in 1987 to be positioned as either a merger partner or a stand-alone entity, which includes force reductions; and SFSP's proposed responses to the press as to the labor effects of a merger. In addition, Tu submitted documents purporting to show a close corporate relationship between PFE and SPT such that PFE's employees were in fact employees of SPT and who, like the union members, were adversely affected by SPT's actions allegedly directed by SFSP.

Railroad Arguments. In response to the submissions of the unions and Tu, SFP submitted evidence to show that any reductions-in-force SPT experienced during the voting trust were

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the reductions-in-force and were carried out by SPT with the knowledge of, and in furtherance of, SFSP's plans for the merger.

due not to the proposed merger, but rather to the same structural conditions in the industry as a whole which led to overall decreases in employment. In fact, SFP states that reductions on SPT were less severe than the reductions made by most other railroads. SFP's evidence shows that SPT's employment fell by 5,975 employees (20.1%), compared to 74,504 employees (23.1%) industrywide. Of the 5,975 SPT employees, 3,917 (71.5%) were affected in 1987, after the ICC had denied the merger.

SFP avers more specifically that, from 1985 to 1986, SPT employment of maintenance-of-way (MOW) and maintenance-of-equipment (MOE) personnel actually increased. SFP indicates that, during 1984-87, overall rail industry MOW employment declined by 15,762 (23.8%), compared to a decline on SPT of 248 (5.1%). In 1986, SPT's average employment in this category increased by 692 employees. SFP shows similar results during the same period for MOE employees. Overall employment in the rail industry for these workers declined by 14,163 (23.1%), while SPT's employment declined by 883 (18.1%). In 1986, SPT's average employment in this category increased by 54 employees. Similar data were presented based on ton-miles (a measure of work performed) for overall employment as well as for MOW and MOE workers.

SPT states that business circumstances prompted the reductions in its work force. It notes the ICC's findings in SFSP I that it was, and for some years had been, a marginal carrier, 2 I.C.C.2d at 833, and the ICC's findings in Rio Grande that SPT had suffered substantial intramodal and intermodal competition and had been forced to supplement operating revenue with proceeds from the sale of real estate, 4 I.C.C.2d at 942.

SPT states that, in the face of its problems, it attempted to manage its system so that it could cope with conditions and remain an effective competitor.

SPT introduced a study of its actions between 1978 and 1988 in relation to other western Class I carriers. The study was performed jointly by an outside consultant and SPT's Managing Director for Strategic Planning. They concluded:

> [A]ctions taken by SPTC management during the period of the independent voting trust were reasonable within the competitive environment SPTC faced, were similar in nature to those taken by other western Class I railroads facing many of the same business circumstances, and were consistent with SPTC's economic self-interest as an independent railroad.

The study notes a difficult business environment influenced by industry deregulation, increased competition, loss of traditional traffic sources, and lack of certainty as to SPT's future. During the period from 1978 to 1988, SPT's revenues were growing more slowly than those of other western Class I railroads, while its costs were increasing at about the same rate. Consequently, SPT's net revenue from rail operations suffered relative to its competitors. During the same period, SPT's employee productivity, when measured by revenue per employee, net ton-miles per employee, and carloads per employee, was lower than for the other western Class I railroads. Thus, SPT had to reduce employment to improve productivity. Nevertheless, during the period from 1983-87, when the voting trust was in effect, average employee levels relative to 1978 were higher for SPT than for its competitors.

Specifically with regard to MOW employees, the study found that, SPT's MOW employee force reductions were prudent in light

of its declining traffic volume, and, if anything, on the cautious side relative to other western Class I railroads. SPT submits that the study strongly contradicts the unions' assertion that the force reductions were directed by SFSP or were in any way contrary to the actions which SPT management unilaterally and logically should have taken to serve SPT's own independent business interests.

Turning to the specific evidence submitted by the unions, SPT states that many of the 149 MOE employees that left SPT during 1985 left because of resignations, discharges for cause, furloughs, severance, retirements, and so forth, and that, in any event, 139 of the 149 positions had been eliminated by June 1985, i.e., before the inquiry from SFSP's Chairman in July 1985 asking whether any equipment programs could be deferred. The MOW employee data, SPT states, directly contradicts the unions' theory that SFSP was forcing SPT to hold down employment levels during the voting-trust period: from January 1985 to September 1986, the number of BMWE-represented employees increased by 649 positions; more specifically, from July 1985 (when SFSP's Chairman sent the letter to SPT's Chairman about deferring equipment programs) to September 1986, the number increased by 186.

SPT argues that the correspondence relied upon by the unions shows only that (1) SPT's Chairman reported certain historical information to SFSP's Chairman, and (2) the former advised the latter that SPT would not do certain things which SFSP might have thought desirable. SPT views the correspondence as indicative of SPT's independence, and not of any responsiveness to SFSP direction.

Union Rebuttal. In rebuttal, the unions characterize the explanations submitted by SFP and SPT as after-the-fact rationalizations for their actions. They argue that SFP and SPT did not submit any documentary evidence created during the pendency of the voting trust to support their claim that their behavior was an innocuous product of "market forces." Moreover, in the unions' view, the employees are not required to produce a "smoking gun" document clearly and unequivocally stating SFSP's orders to SPT.

To the contrary, the unions state, in Kraus, 878 F.2d at 1199, the court of appeals found that the evidence supported a jury verdict that the defendants interfered in SPT's business relationships to avoid the costs of potential post-merger approval labor protection and that SPT was willing to comply with defendant's desires. Based on their contention that SFP is collaterally estopped from denying that SFSP interfered in SPT's management, the unions apparently see the issue here as whether SPT's actions adverse to union workers can reasonably be inferred as having been taken in response to SFSP's cost-cutting desires, which were proved in Kraus.

DISCUSSION AND CONCLUSIONS

Based upon the evidence presented, we find that the employees (as a class) have failed to establish that they were adversely affected as a direct consequence of actions taken or orders issued by SFSP in contemplation of the proposed merger.

Collateral Estoppel. Initially, we will address the issue of collateral estoppel,[12] which was raised by the unions. They urge us to use the Kraus verdict offensively,[13] by finding that SFP and SPT are estopped from denying that SFSP interfered in SPT's business decisions.

We find that the use of collateral estoppel would be inappropriate here. The Court of Appeals in Kraus dismissed plaintiffs' Federal claim of unlawful control over SPT in violation of 49 U.S.C. 11343. This is the relevant issue here; as the court noted, it is entirely distinct from the issue involved in the state tort proceeding (whether SFSP interfered with SPT's economic relationships with its employees).

In rejecting defendants' contention that the Interstate Commerce Act preempted the state law claim raised by the plaintiffs, the court in Kraus concluded that a violation of section 11343 is not an essential element of the state law claim of tortious interference with economic relationships. The court noted that, to be found liable under the state law claim,

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[12] Collateral estoppel (also referred to as "issue preclusion"), like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (Parklane).

[13] Offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant. Id.

defendants "need not have `controlled' Southern Pacific; rather, they need only have wrongfully interfered with plaintiffs' economic relationships." Kraus, 878 F.2d at 1200. Because the issues litigated in Kraus differ significantly from the relevant issues here, this is not a proper instance for the offensive use of collateral estoppel.

Furthermore, SPT was not a defendant in that case on either the Federal or state cause of action with regard to the termination of the two plaintiffs. Because "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard," Parklane, 439 U.S. at 327, citing Blonder-Tongue v. University Foundation, 402 U.S. 313, 329 (1971) and Hansberry v. Lee, 311 U.S. 32, 40 (1940), no findings in Kraus may be used to make a case against SPT here.

The Evidence. Turning to evidence in this case, the employment data relied upon by the unions show that from January 1985 to September 1986, MOW employees on SPT increased. Although MOE employees decreased by 149 positions (from 1,349 to 1,200), SPT attributes the decrease to necessary cost-cutting measures due to its poor financial condition as well as to low employee productivity, traffic declines, competition, and other factors not related to the merger. Moreover, 139 of the 149 positions were eliminated prior to the mid-1985 correspondence from SFSP to SPT,[14] and comparable cost cutting was pursued in areas other than labor.

[14] The bare data also do not reflect the number of employee reductions attributable to resignations, retirements, discharges for cause, and other normal events.

The unions ask us to draw inculpatory inferences about the motivation behind SPT's actions. However, the evidence indicates that SPT's labor-reducing actions were motivated by its rational self-interest in preserving and enhancing its position in the industry. SPT presented evidence that its actions were consistent with industry conditions and trends between 1983 and 1988, when major reductions in the railroad industry's work force occurred because of traffic declines and increased competition, among other reasons. In fact, SPT's workforce reductions were somewhat lower than those of Class I railroads overall.

The unions attack SPT's study as an after-the-fact rationalization and submit that contemporaneous documents should have been produced to substantiate the claim that SPT's actions were not dictated by SFSP. The fact that the study was prepared after the events in question does not detract from the accuracy of the data in the study or the motivation that SPT attributes to its management. It is highly unlikely that documents would have been prepared to memorialize SPT's motivation when there was no pending question concerning SPT's labor actions. Moreover, the unions have not presented any contemporaneous documents to show that SPT was not acting in its self-interest or was acting under the control of SFSP. The unions claim that it is highly unlikely that the merger parties would have left behind a "smoking gun"; by the same token, there is no reason to believe that the merger parties would have prepared documents to the contrary, which would be available to refute the unions' charges.

SPT's failure to seek financial assistance from SFSP should not have any bearing upon our consideration of the actions the railroad did take to reduce operating expenses. Additional money

from SFSP would have been warranted if conditions justified a higher level of MOW and MOE spending. SPT's study contains a strong showing that it responded to conditions rationally, taking the same general kinds of actions as other Class I carriers, except perhaps that it was too cautious in reducing MOE and MOW activity during the relevant time period. While the unions disagree, they have not shown that SPT's decisions were dictated by SFSP.

We draw nothing conclusive from the fact that some communications occurred between SPT and SFSP, and that some changes in SPT employment occurred. The timing and content of the communications and nature of SPT's changes in employment do not meet the established standard for this proceeding, or for that matter, even the unions' alternative standard. The evidence is persuasive that SPT's cost-cutting actions during the relevant period were in keeping with its needs and consistent with those of other Class I carriers. The unions have failed to bolster their case by any substantive findings from the communications and the employment changes themselves. We have not seen any reliable evidence that the actions taken by SPT were ordered by SFSP, or that SFSP was controlling SPT's decisions at the time.

Employees (as a class) were provided an opportunity to present persuasive evidence on the relevant issue, that is, whether, during the pendency of the voting trust, SFSP exercised unlawful control of SPT so as to affect its labor policy. They have failed to do so. We are unpersuaded by the implication in their pleadings that this was an impossible burden and thus that the ICC's words should not be taken literally. The language used in the earlier decision was carefully chosen to frame the issue

in a manner appropriate to the unique circumstances of whether labor conditions should be imposed on a failed merger where any changes in employment were presumably made pursuant to existing collective bargaining agreements. The burden imposed was not insurmountable. Written materials are not the only way the employees could have met the established burden. Depositions could have been taken from managerial personnel who worked for SFSP, Santa Fe, and SPT at the time to elicit testimony showing improper influence of SPT's labor policy. Such statements, if not wholly supportive, might have been bolstered by circumstantial evidence such as a clear showing that SPT was acting contrary to its own self-interest in the job cuts it made and thus must have been acting under the direction of an outside influence.

Moreover, the unions have not satisfied the burden under even their own standard. The dates of the communications cited by the unions as the basis for their case do not create a logical cause-and-effect relationship with the actions complained of; many of the job actions occurred prior to the communications, and in some instances, employment actually increased after the cited correspondence.[15] In addition, SPT's responses do not contain any implication that it considered itself under SFSP's control. While the unions rely heavily on the evidence of relevant force

[15] Tu cites documents, including verified statements submitted with the merger application and press releases prepared for use during the pendency of the proceeding, to demonstrate unlawful control. She fails to recognize that, in seeking approval of a merger, applicants must demonstrate the expected effect of the transaction on employees, as well as the anticipated savings which in part lead to the public benefits of the transaction. Such required evidentiary submissions cannot logically be used to demonstrate undesirable communications or unlawful control. Press releases were presumably prepared to inform the public about the nature of the presentation lawfully submitted to the ICC.

reductions, the timing of the communications and the operating changes suggests no cause-and-effect relationship.

The unions' evidence and argument also ignore the need for cost-cutting as a necessary part of management's job, no less so during the pendency of a merger proceeding. With or without ICC approval of the merger, SPT reasonably should have taken steps to assure its viability; it would either merge with Santa Fe or have to find another disposition to allow dissolution of the voting trust.

With regard to Tu, she has not shown any causal connection between the communications between SPT and SFP and her furlough from employment by PFE. The communications between SPT and SFP occurred in July 1985. A report prepared in June 1985 by T. D. Ellen, General Manager of PFE, entitled "The Future of the Perishable Business and PFE" (the Report) (which was put into the record by both SPT and Tu), shows that SPT was actively considering the disposition of PFE for independent business reasons before the July communications between SPT and SFP. The Report makes clear that by 1982, as a result of the deregulation that occurred after the Staggers Act of 1980 was enacted, PFE was confronted with serious structural problems in the perishables business. At that time, PFE employed approximately 500 persons to service an under-utilized fleet of 5,000 refrigerated freight cars. By May 1985, PFE had reduced employment to 250 persons and was handling the same volume of business it had in 1982. The Report describes various attempts that were made between 1982 and 1985 to make PFE stable and profitable, but by 1985 PFE could not provide service at less than the cost to produce that service. Thus, by June 1985, SPT had already concluded that PFE was not a

viable enterprise and was considering actions to reduce the cash drain at PFE well before the communications between SPT and SFP in July 1985. After analyzing its options, SPT decided to eliminate PFE as a separate entity and fold back its remaining operations into SPT. As a result of this decision, Tu was laid off, along with several other employees, in August 1985. We conclude that Tu was laid off because of the need to eliminate losses at PFE and that SPT's actions with respect to PFE would have occurred even if there had been no proposed merger. Therefore, Tu would not be entitled to employee protective benefits even if she were considered to be an employee of SPT.

The unions and Tu have not presented evidence sufficient to link SPT's cost-cutting measures to directions from SFSP to enable us to conclude that SFSP and SPT violated the ICA or the conditions of the ICC's voting trust that SPT continue to operate independently of SFSP during the pendency of the merger proceeding before the ICC. Accordingly, their requests for us to exercise our general discretionary conditioning power to impose employee protective conditions will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request of BMWE and IAMAW for employee protective conditions in this proceeding is denied.

2. The request of Sieu Mei Tu for employee protective conditions in this proceeding is denied.

3. This proceeding is discontinued.

4. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary